IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 204

JOHN LACKNER,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

PETITION OF JOHN LACKNER FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioner, John Lackner, respectfully prays for the writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review a judgment of that court entered on the 4th day of April, 1940, in the case numbered and entitled on its docket No. 7010, *John Lackner, Appellant* v. *Illinois Bell Telephone Company, et al., Appellees,* affirming the decision of the United States District Court in and for the Northern District of Illinois,

Eastern Division, wherein petitioner was denied leave to file intervening petition on behalf of himself and other telephone subscribers in a proceeding before said District Court concerning the refund to said subscribers of overcharges paid by them for telephone service in the City of Chicago. A transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith. The decision of the Circuit Court of Appeals is reported in 111 Fed. (2nd) 136 (1940), and is attached as an appendix hereto.

Summary and Short Statement of the Matter Involved.

This case challenges the constitutionality of a proceeding whereby the customers of the Illinois Bell Telephone Company were deprived of $2,197,000 due them as refunds for overpayments made in excess of the legal rate for telephone service as established by an order of the Illinois Commerce Commission, which refunds were ordered returned to them by a mandate of this Court. Diligent search has failed to produce a single decision, with the exception of the decision of the Circuit Court of Appeals herein, of Federal or State courts that directly governs the issue presented by this petition.

At the conclusion of litigation extending over a period in excess of eleven years, this Court affirmed an order of the Illinois Commerce Commission establishing reduced telephone rates in Chicago. Subscribers were compelled to pay a higher rate during the entire period of litigation because of an injunction issued by the District Court restraining the Illinois Commerce Commission from enforcing the reduced rate. This Court, by its mandate in *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151, 176, remanded the case with direction "to dissolve

the interlocutory injunction, to provide for refunding in accordance with the terms of that injunction and of the bonds given pursuant thereto, of the amounts charged by the Company in excess of the rates in suit". (R. 2.) The injunction bonds filed by the Telephone Company provided that it should repay with interest "any sums paid by the said subscribers to the plaintiff for telephone service rendered said subscribers, or any of them, pursuant to the provisions of the said order of the Illinois Commerce Commission." (R. 4-6.)

The petitioner and subscribers similarly situated who had paid the Telephone Company the sum of $18,798,980.14 in excess of the legal rate, and who filed claims and qualified for refunds and were entitled to receive the same under the aforesaid mandate of this Court, failed to secure full reimbursement of the amount due them by approximately $2,197,000.00. The deficiency was brought about through two orders of the District Court entered without notice to said subscribers and without giving them their day in court, whereby (1) two attorneys, who had likewise been appointed without notice to the subscribers or an opportunity on the part of the subscribers to be heard, were allowed $1,500,000.00 as fees (R. 47), and (2) the State of Illinois was allowed $60,000.00, the City of Chicago $37,000.00 (R. 469), and (3) interest due under the injunction bond was waived to the extent of $600,000.00. (R. 455.) The total aggregate of these sums, or $2,197,000.00, was deducted from the fund created by the overpayments made by the subscribers.

The attorneys who received the fee did not notify their clients (the subscribers) that they would apply to the District Court for an allowance of fees, but proceeded

to conduct the hearing on their petition *ex parte* and in a dual capacity, representing themselves as petitioners and the subscribers as respondents.

At the expiration of the time set by the District Court for the filing of claims, there remained in the refund account an undistributed balance of $1,688,295.68. (R. 409.) This fund was, at said expiration date, and still is, in the possession of the Telephone Company. The State of Illinois, the County of Cook and the City of Chicago immediately filed petitions claiming this balance. The State of Illinois was represented by the Attorney-General, the County of Cook by the State's Attorney, and the City of Chicago by its Corporation Counsel. The District Court denied all petitions.

Notwithstanding the substantial fee the attorneys appointed by the Court had received and their apparent duty to protect the interests and rights of the subscribers, and the further fact that the subscribers entitled to full refund had not received the sums they were entitled to, to the extent of $2,197,000.00, no effort was made by said attorneys to claim this fund for the subscribers who, under the terms of the mandate of this Court and the construction placed upon said mandate by the District Court, were solely entitled thereto. (R. 446-453.) The District Court commented on the lack of interest on the part of these attorneys by stating, "They have made no recommendation as to the distribution of this unclaimed balance of funds, nor have they taken any stand in reference to the claims of the City or the other claimants for reimbursement of expenses." (R. 450.)

When it became apparent that this fund of approximately $1,700,000.00 would become the property of the Telephone Company by default, petitioner, in behalf of

himself and other subscribers similarly situated, having in mind the deficit of $2,197,000.00, presented his intervening petition to the District Court and asked leave to file the same. This petition contained in substance the facts hereinabove set forth and concluded with the allegation that the subscribers, by reason of having failed to receive notice and an opportunity to be heard, had been deprived of their property without due process of law and in violation of Article V of the Bill of Rights of or the 5th Amendment to the Constitution of the United States.

This petition was presented to the District Court on March 2, 1938, by informal motion. No argument was presented by either side at that time, neither was any testimony heard by the court. The motion to intervene was taken under advisement by the District Court on that date. (R. 471.) No further proceedings, arguments or hearings were ever held in connection with the said petition from that date forward. However, about one year later, March 13, 1939, the District Court entered an order to the effect that "This cause coming on to be heard on the petition of John Lackner, the Court having heard the arguments of counsel, It Is Ordered that the prayer of the said Petition be and the same is hereby denied." (R. 489.) No findings of fact or propositions of law were submitted by the Court in support of said order.

The order of the District Court denying the right of the appellant to intervene on behalf of himself and other subscribers similarly situated was appealed to the United States Circuit Court of Appeals for the Seventh Circuit. This latter court affirmed the ruling of the lower court on the general theory that if any prejudice had been suffered by the subscribers through lack of notice or an

opportunity to be heard when the attorneys were appointed by the court and allowed a fee of $1,500,000.00, this prejudice, if any, was compensated by the fact that the Attorney General, who was in the case for the sole purpose of representing the Illinois Commerce Commission, and the Corporation Counsel, who was in the case for the sole purpose of representing the City of Chicago, were present when the orders were entered. (*Illinois Bell Telephone Co.* v. *Slattery,* 102 Fed. (2d) 58-62 (1939). This position was taken by the United States Circuit Court of Appeals notwithstanding the fact that the Attorney General and Corporation Counsel subsequently demonstrated their respective interests were antagonistic to that of the subscribers by filing a petition to secure the unclaimed balance of $1,700,000.00 and made no effort to advance the interests of the subscribers, and the further undisputed fact that the District Court must have been of the contrary opinion when it deemed it necessary to appoint other attorneys than the Attorney General and Corporation Counsel to represent subscribers in the refund proceedings. The Circuit Court of Appeals did not specifically dispose of the objection regarding allowance of litigation expense to the State and City or the waiver of interest required by the injunction bond except to say that petitioner's petition did not specifically set up these objections. The Circuit Court of Appeals also held that the receipt of a check by appellant a year after the entry of the order of July 23, 1934, tended to create grounds for the impression that appellant had legal notice of the proceedings complained of herein. The check was not a part of the record or printed abstract filed in the Circuit Court of Appeals, neither was it before the District Court at the time it entered any of its orders in the refund proceedings. Three days

before this case was due to be argued orally before the Circuit Court of Appeals, and several weeks after printed abstract of the record and briefs had been filed by both sides, the Telephone Company made a motion to consider an unauthenticated photostatic copy of this check as part of the record. The Circuit Court of Appeals, over objection of appellant, allowed the motion, notwithstanding the fact that inasmuch as it was not a part of the record filed therein this check could not be and was not referred to or argued in appellant's brief. We discuss this phase of the case more in detail in our brief filed in support of this petition.

If the decision of the Circuit Court of Appeals is permitted to stand, subscribers of public utilities who are compelled to pay illegal and excessive rates will be deprived of their constitutional right to notice of proceedings governing the return of their property and be denied the fundamental right of having their day in court to be heard regarding the impairment or disposition of said property rights.

Subject-Matter.

The subject-matter of this proceeding originated with petitioner's motion as a subscriber of the Telephone Company for leave to file his intervening petition in behalf of himself and other subscribers similarly situated, praying, among other things, that the District Court's decree of July 23, 1934, and its order of February 5, 1938, be set aside account of lack of legal notice to the subscribers of proceedings had in connection therewith. The former decree allowed $1,500,000.00 attorneys' fees and waived interest due the said subscribers, under the provisions of an injunction bond filed by the Telephone Company, in the sum of approximately $600,000.00. The latter order al-

lowed the State of Illinois $60,000.00 and the City of Chicago $37,000.00 for "litigation expense", and resulted in the Telephone Company obtaining by default possession of an unclaimed balance of refund moneys amounting to approximately $1,700,000.00. (R. 469, 470.)

Petitioner represented to the Circuit Court of Appeals that the refund declared to be due subscribers by the decision of this Court in *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151, 176 (1934), created in each of said subscribers a property right surrounded and safeguarded by definite constitutional guarantees: (1) The right to receive proper and legal notice when proceedings were contemplated that would in any manner depreciate or affect those rights. (2) The right to their day in court and an opportunity to be heard before a decision concerning said rights was entered by the court. In substance, they urged upon the court that they could not be deprived of their aforesaid property rights without due process of law. Petitioner further represented that the subscribers' interest in the funds held by the Telephone Company created a basis for intervention as of right and because of the presence of this interest in the subject-matter the District Court had no discretion in permitting the filing of the said petition and in denying them this right the District Court's order was in error and contrary to Rule 24-a of the Federal Rules of Civil Procedure then in force and effect. (3) Petitioner further represented that the personal interest of Messrs. Haight and Goldstein, the attorneys appointed by the court, disqualified them from representing the subscribers as well as themselves, the said attorneys, in the proceeding which resulted in said attorneys being allowed fees of $1,500,000.00 from funds belonging to said subscribers.

The decision of the Circuit Court of Appeals did not directly decide any of the above issues. It avoided these issues by taking the position that the Illinois Commerce Commission and the City of Chicago in their public capacity also represented the individual subscribers in a matter concerning the latter's private property rights. It should be clearly borne in mind that this proceeding is essentially different from reparation cases heretofore considered by this Court and District Courts in that the present case presents a situation where subscribers' rights to refund had become final and absolute by the decision of this Court. (*Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151 (1934). The funds involved were just as much their private property as their private bank account or other personal property. The Illinois Commerce Commission and City of Chicago, by the very nature of their legal existence, have to do solely with public rights and interests as distinguished from the individuals' personal property rights. No law ever gave the Illinois Commerce Commission or the City of Chicago authority to interfere with private individual rights where, as in this case, those rights in no way conflicted with the rights of the public as a whole. The Circuit Court of Appeals in its decision did not explain why the District Court specifically, although illegally, appointed special attorneys for this very purpose, if, as it contended, the subscribers' rights were amply protected by the public law officers. Neither did it explain why the said special attorneys could, under the circumstances, be properly allowed $1,500,000.00 fees, or that subsequently both public law officers sought to obtain the unclaimed refund balance of $1,700,000.00 for their respective clients, the State and the City, and why no one intervened in behalf of the subscribers to protect the latter's interest in said fund. Neither did the decision explain why the special

attorneys, appointed by the court ostensibly to protect the subscribers' interest, stood silently by and permitted the Telephone Company to claim the fund by default, while the subscribers, individually and as a group, were prevented by an injunction order of the District Court from retaining any other attorney to look after their interest (R. 35-39-42), which, at that time, was represented by a deficit of $2,197,000.00.

The Circuit Court of Appeals attempted to justify the lack of notice by holding that the receipt of a check by petitioner a year after the entry of the order here complained of, constituted actual notice. This check does not, in any sense, constitute such notice as is contemplated by the constitution of the State of Illinois or the constitution of the United States, and we are confident petitioner would have demonstrated this fact to the Circuit Court of Appeals if given an opportunity to do so. However, the unauthenticated photostatic copy of the check which was not a part of the record in the proceedings before the District Court, was presented by the Telephone Company for the first time in proceedings before the Circuit Court of Appeals several weeks after the record, the printed abstract thereof and briefs of both parties had been filed. On the morning of the day this case was called for oral argument before the Circuit Court of Appeals, said court entered an order permitting the unauthenticated photostatic copy of the check to be considered as part of the record. This gave petitioner no opportunity to prove the document's insufficiency or illegality. It is respectfully represented that this order of the Circuit Court of Appeals was clearly in error.

If the decision of the Circuit Court of Appeals is permitted to stand, it will create a precedent detrimental

to the interests of every subscriber to public utility service throughout the nation. It will give notice that proceedings concerning refunds in which said subscribers have a definite and vital property interest may be conducted by public utilities without giving the subscribers legal notice or an opportunity for said subscribers to be heard in defense of their own property rights. It will further encourage public utilities to presume upon this lack of constitutional protection in the conduct of its litigation in attacking valid rate orders of state public utility commissions throughout the nation.

Questions Presented.

1. Whether public utility subscribers in rate reparation proceedings are entitled to the same consititutional guarantees that are accorded other citizens in the disposition of their private property rights.

2. Whether a deficiency of $2,197,000.00 represents such an interest in an unclaimed refund balance of $1,700,000.00 as comes within the provisions of Rule 24-a of the Federal Rules of Civil Procedure, and entitles public utility subscribers to intervene as a matter of right in a proceeding governing the disposition of said unclaimed fund.

3. Whether a District Court in a rate reparation proceeding may allow attorneys' fees of $1,500,000.00 from subscribers' funds where said attorneys represent conflicting interests—their own interests as beneficiaries of said fees, and the property right interests of their clients in the funds from which said fees are paid.

4. Whether a District Court in a rate reparation proceeding, without notice to interested parties, has authority

to nullify the conditions of an injunction bond and waive interest requirements to the extent of $600,000.00.

5. Whether subscribers in a rate reparation proceeding must be first fully reimbursed in accordance with the mandate of this Court before distribution of funds constituting excessive rate payments shall be made to the State and the City for "litigation expense".

6. Whether a public utility may profit to the extent of $1,700,000.00 by reason of its eleven years' unsuccessful litigation in an effort to avoid a valid rate order of a State Commission where subscribers have failed to receive full reimbursement in accordance with the mandate of this Court.

Reasons Relied on for the Granting of the Writ of Certiorari.

1. The case presents questions of the first importance relating to the constitutional rights of subscribers in public utility reparation cases which have not heretofore been passed upon by this Court. An authoritative decision of these questions by this Court is of pressing importance not only to the parties to this cause but also the millions of like subscribers whose interests are directly affected in present and future refund litigation.

2. The decision of the Circuit Court of Appeals in recognizing a right in a public utility to profit by its defiance of a valid and constitutional order of a State Commission, while the subscriber suffers a deficit in the amount of $2,197,000.00 due them account of excessive rates paid through court order, has established a precedent of importance to rate payers in Illinois, as well as other States, and one that is contrary to the best interests of public policy. Such a precedent gives support

to the utilities' asserted ownership of all unclaimed funds and encourages their opposition to Commission orders, for experience has demonstrated that in every rate case, upon the ultimate dissolution of an injunction, so widespread, changed and confused are the individual ratepayers, there is a substantial balance which cannot be returned to particular subscribers who made the excessive payments. (Public Utility Refunds (Feb. 1939) 15, The Journal of Land and Public Utility Economics, 12.)

3. The matter here involved is of grave and pressing importance in the regulation of public utilities. The principle established makes it possible for a utility to collect excessive charges from its millions of subscribers over a long period of time under promise of repayment, and then to retain the unclaimed balance. The decision of the Circuit Court of Appeals permits the mere choice of a method of collecting excessive charges and the method of administering the repayment of those charges, adopted for reasons of economy and expediency, to dictate a result that is not only grossly unfair and inequitable, but contrary to the intention of the parties. The unclaimed fund of $1,700,000 should not be kept by a wrongdoer in preference to the subscribers who created said fund by forced payment of excessive charges under an injunctional court order.

4. The question here raised should, in the greater interests of the public, be settled. This Court should review the interpretation of a decree having such far-reaching significance. (*St. Louis, Kansas City & Colorado R. R. Co.* v. *Wabash R. R. Co.*, 217 U. S. 247, 251 (1910)).

5. Aside from the novelty and importance of the issues presented, the decision below should be reviewed for the

additional reason, we submit, that it is clearly erroneous and not in accord with the principles of applicable decisions of this Court and the Supreme Court of the State of Illinois.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, sitting at Chicago, Illinois, commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals, or such portion thereof as this Court may deem necessary, had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

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